Supreme Court, U.S.
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No. 91-70

In The

Supreme Court of the United States

October Term, 1991

BLUE FLAME, INC.,

Petitioner,

v.

THE METROPOLITAN DEVELOPMENT COMMISSION OF MARION COUNTY, INDIANA,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Indiana

BRIEF OF RESPONDENT IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED FOR REVIEW

Respondent respectfully disagrees with Petitioner's statement of the question presented for review. The following is submitted as a more accurate statement of the question presented:

> Are the rights of Petitioner to freedom of expression under the First Amendment to the Constitution of the United States violated by the application of the provvisions of the Adult Entertainment Business Ordinance of Marion County, Indiana, which prohibit the operation of an adult cabaret within 500 feet of a residential zoning district, despite the fact that the residential zoning district is not currently being used for residential purposes.

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Young v. American Mini Theaters, 427 U.S. 50, 49 L.Ed.2d 310, 96 S.Ct. 2440 (1976).....4, 6, 7, 10

Respondent, The Metropolitan Development Commission of Marion County (hereinafter referred to as the "Commission"), respectfully requests that this Court deny the pending Petition for Writ of Certiorari, in which Petitioner is seeking review of the opinion issued below by the Court of Appeals of Indiana, Fourth District. The opinion of the Court of Appeals was an unpublished Memorandum Decision, which is set forth verbatim by Petitioner in the Appendix to Petitioner's Brief filed herein (Pet., A-9–A-16). The Commission accepts the sections of Blue Flame's Brief titled Opinion Below (Pet., 3), Jurisdiction (Pet., 5), and Constitutional and Statutory Provisions Involved (Pet., 6).

STATEMENT OF THE CASE

The Commission does not accept Blue Flame's Statement of the Case. Therefore, the Commission offers the following Statement of the Case for the Court's consideration:

Blue Flame, Inc. purports to be an Indiana corporation doing business as "Blue Flame", a tavern which is located at 5478 Brookville Road, Indianapolis, Marion County, Indiana (hereinafter referred to as the "Real Estate"). On or about January 9, 1986, the Blue Flame was issued a notice of zoning violation by the Commission in which it was alleged that the establishment was operating as an adult cabaret within 500 feet of a residentially zoned district. Following receipt of the notice of zoning violation, Blue Flame, by and through its attorneys, filed a petition for a zoning variance by which Blue Flame

sought approval for the ongoing adult use. Specifically, Blue Flame sought relief from Section 5 of the Adult Entertainment Business Zoning Ordinance of Marion County, Indiana which, *inter alia*, prohibits the establishment of an adult entertainment business within 500 feet of a residential zoning district (Pet., B-4).

It should be noted that the Real Estate is zoned C-5, a classification which permits a multitude of enumerated commercial uses. In Marion County, Indiana, adult businesses, including adult cabarets, are permitted in C-5 zoning districts, subject to certain conditions and restrictions. An adult cabaret is permitted in a C-5 district only if the cabaret is situated more than 500 feet from specified protected zoning districts, including residential districts (Pet., B-4). The evidence in the case below established that the Blue Flame tavern was situated closer than 500 feet to D-5 (residential) zoning districts.

In 1986, Blue Flame was denied its petition for zoning variance after a hearing before the Metropolitan Board of Zoning Appeals. Thereafter, because of stays of enforcement granted by the Municipal Court in the enforcement case, and by the Marion Superior Court, Civil Division, Room 3, in the case involving judicial review of the variance denial, Blue Flame continued operating as an adult cabaret despite the variance Board's adverse decision.

The certiorari review of the variance denial was conducted by the Marion Superior Court, Civil Division, Room 3. The action of the Metropolitan Board of Zoning Appeals in denying the requested zoning variance was affirmed by the trial court in that case. Thereafter, the

Superior Court's decision was affirmed by the Court of Appeals of Indiana in an appeal totally distinct from the one which is the subject of the pending Petition for Writ.

Following completion of the certiorari proceedings in the Indiana Courts, the Commission proceeded with its pending enforcement action (which had been subject to a lengthy stay) in the Marion County Municipal Court, Room 12. Following a trial on the merits, the Marion County Municipal Court, Room 12, issued an injunction in favor of the Commission and against Blue Flame. The injunction issued in the enforcement action was the subject of Blue Flame's appeal to the Court of Appeals of Indiana and is the subject of Petitioner's pending request for a writ of certiorari from this Honorable Court.

As the procedural history of the case documents, Blue Flame has been afforded multiple opportunities to obtain administrative and/or judicial sanction for the adult use to which the Real Estate has been put. Stays have been granted by Indiana Courts in order to protect Blue Flame's commercial interests during the pendency of the numerous proceedings which have been initiated since 1986, including: a variance request; an appeal of the variance denial to the trial court; an appeal of the trial court's refusal to overturn the variance denial to the Court of Appeals of Indiana; a trial of the Commission's enforcement action in which the Commission sought an injunction; and an appeal to the Court of Appeals of Indiana and to the Supreme Court of Indiana of the trial court's judgment granting an injunction. It is in this procedural and historical context that the United States Supreme Court is being asked by Petitioner to grant certiorari review herein.

ARGUMENT

I.

BLUE FLAME'S PETITION SHOULD BE DENIED BECAUSE THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S PRIOR DECISIONS

In its opinion, the Court of Appeals of Indiana looked to this Court's prior decisions for guidance in dealing with the constitutional question raised by Blue Flame. The Court of Appeals carefully considered and addressed the First Amendment issue, which was one of the bases upon which Blue Flame asserted the case should be decided.

In addressing the First Amendment question, the Court of Appeals appropriately directed its attention to two United States Supreme Court decisions which have upheld ordinances similar to the Adult Entertainment Business Ordinance of Marion County, Indiana. Both *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 49 L.Ed.2d 310, 96 S.Ct. 2440 (1976), and *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 89 L.Ed.2d 29, 106 S.Ct. 925 (1986), provide controlling insight in the present controversy. The Supreme Court held in both *Young* and *Renton* that the municipality's interest in planning and regulating the commercial use of property is a valid basis for restricting the location of movie theaters which present what may be described as adult entertainment. The Court found the challenged restrictions to be neither an impermissible prior restraint, nor an invalid suppression of speech and expression.

Further, the Supreme Court in those cases held that the reviewed ordinances constituted valid regulation of protected expression because, although each regulated the time, place and manner of expression, each was sufficiently neutral so as not to effect a total suppression or ban of the regulated activity. Instead, each ordinance merely governed the locale within which adult establishments could be situated.

Blue Flame in its Petition has set forth at Appendix "B" what Petitioner describes in its Table of Contents (Pet., 2) as "pertinent parts" of Marion County's Adult Entertainment Business Zoning Ordinance. Blue Flame excerpted only approximately four (4) pages from the fourteen (14) page ordinance and excluded from its Appendix virtually all of the definitions and certain relevant portions of the prohibitions. The relevant portion of the Marion County Adult Entertainment Business Zoning Ordinance from which Blue Flame sought relief is as follows:

> SECTION 5. *Prohibitions*
> The establishment, enlargement, reconstruction, resumption or structural alteration of any adult entertainment business shall be prohibited if such business is within 500 feet of two other such businesses or within 500 feet of any existing church zoning district, school zoning district, park zoning district, agricultural zoning district, historic preservation zoning district or residential zoning district within Marion County, Indiana.
>
> Provided further, that no adult entertainment business shall be established, enlarged, reconstructed, resumed or structurally altered unless

> the site or proposed site is located in a C-4 (Community-Regional Commercial) zoning district, C-5 (General Commercial) zoning district, C-6 (Thoroughfare Service) zoning district, C-7 (High Intensity Commercial) zoning district or C-ID (Commercial-Industrial) zoning district.
>
> Provided further, that no adult entertainment business shall be established, enlarged, reconstructed, resumed or structurally altered in a C-4 (Community-Regional Commercial) zoning district unless the site or proposed site is located within an integrated center."

Blue Flame's real estate is zoned C-5, and Blue Flame could have operated an adult cabaret on the Real Estate without a variance except for the fact that the establishment was located closer than 500 feet to a residential zoning district. It was the distance requirement which made the use unlawful and from which Blue Flame sought relief. The Adult Entertainment Business Zoning Ordinance does not prohibit the offering of adult entertainment, including partially clad females exposing their breasts and/or buttocks. The ordinance merely prohibits the offering of that type of entertainment within 500 feet of a residential zoning district (and certain other protected districts, such as church and school districts).

In both *Young* and *Renton,* such ordinances and the associated regulation of content-based activity have been sanctioned where the regulations do not result in a total ban or suppression and where a legitimate governmental interest is served. *Young,* 427 U.S. 50; and *Renton,* 475 U.S. 41. Blue Flame's evidence wholly failed to show that a total ban or a prior restraint resulted from the subject ordinance. Likewise,

Blue Flame failed to show that no legitimate governmental interest was served by the ordinance.

In its argument herein, Blue Flame cited this Court's decision in *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 68 L.Ed.2d 671, 101 S.Ct. 2176 (1981). Although the ordinance at issue in *Schad* was held to be invalid and overbroad, the facts and factors which were relied upon by this Court in *Schad* are easily distinguishable from the facts in the instant controversy. In *Schad*, the local authorities adopted an ordinance, the effect of which was to totally exclude live entertainment, including live nude dancing, from the Borough of Mt. Ephraim. No such ban is contemplated by or has resulted from the adoption of Marion County's ordinance. Instead, Marion County has, consistent with this Court's prior decisions, regulated the placement of adult entertainment in relation to residentially zoned districts. This Court in *Young v. American Mini Theaters, Inc.*, approved such regulation as legitimate. *Young*, 427 U.S. 50. Similarly, the Court in the *City of Renton v. Playtime Theaters, Inc.* case upheld Renton's ordinance which prohibited the location of constitutionally protected speech within 1,000 feet of a residential zone. *Renton*, 475 U.S. 41. In that case, this Court sanctioned the time, place and manner regulation even though Playtime Theaters, Inc. submitted evidence and argument that because of the regulation, it was left with no "commercially viable" adult theater sites within the limited area rendered available through operation of the subject ordinance. Despite that argument, the Supreme Court rejected the attack upon the time, place, and manner regulation, and concluded:

> That Respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does

> not give rise to a First Amendment violation . . . [W]e have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices . . .

Id., 475 U.S. 41 at 54.

Blue Flame has made no argument that it has been deprived of an ability to locate its adult business in a viable commercial area within Marion County, Indiana, nor would such an argument be valid. Indeed, Marion County's 500 foot distance restriction relative to the proximity between the adult business establishments and residentially zoned real estate is only half of that imposed by the local ordinance which was examined and approved by this Court in the *City of Renton* case. *Id.*, 475 U.S. 41.

II.

BLUE FLAME'S PETITION SHOULD BE DENIED BECAUSE BLUE FLAME CITES NO AUTHORITY SUPPORTING ITS CONTENTION THAT THE RESTRICTION SHOULD APPLY ONLY TO RESIDENTIALLY USED AREAS AND NOT TO RESIDENTIALLY ZONED AREAS

The entire thrust of Blue Flame's argument centers upon its contention that Marion County's zoning ordinance is overly restrictive by precluding establishment of an adult cabaret within 500 feet of a residential zoning district. Blue Flame concedes that its establishment is, as the trial court found, closer than 500 feet to a residential zoning district. Blue Flame complains, however, because

at the time of trial, the residentially zoned property was being used as a parking lot and not as a residence. Blue Flame asserts that the Court should direct its inquiry to the actual use of property at the time of ordinance application, rather than to the zoning classification which has been assigned to such property. Blue Flame's argument should fail.

In any metropolitan area, including in Marion County, Indiana, real estate is assigned a zoning classification based upon planning and legislative decisions respecting the highest and best use of property, consistent with governmental interest in providing for orderly and efficient growth within the community. It is, of course, not at all uncommon for real estate to bear a zoning classification which was assigned prospectively and which reflects the community's intention respecting the use of that land, rather than a reflection of the actual use to which the land is being put at the time the classification is assigned. Were Blue Flame's argument to prevail, zoning authorities could never safely plan for the development of new housing areas. Blue Flame presumably would maintain that an adult cabaret could be built in close proximity to a residentially zoned area so long as there was no house or apartment situated thereon and no one yet living on the premises. Thus, zoning authorities would be deprived of any ability to plan for future residential development by zoning, because the plan would be subject to disruption by placement of adult uses immediately adjacent to the residential zones.

Although not discussed by Blue Flame in its brief, it should be noted that because of the residential zoning classification assigned to the real estate in close proximity

to Blue Flame's adult cabaret, such real estate could be converted legally from its present parking lot use to a residential use. If, in the meantime, Blue Flame has been authorized to ignore the zoning classification and to establish its adult cabaret, the very deleterious effects about which the Adult Entertainment Business Zoning Ordinance specifically concerns itself would be realized and would inhibit, deter, or otherwise adversely impact the residential use. Blue Flame's argument finds no support in the precedent established by this Court. Although the *Young v. American Mini Theaters, Inc.* case refers to "residential area", the Court does not suggest that the use, as contrasted with the zoning classification, is the operative criteria. *Young*, 427 U.S. 50. In the *City of Renton v. Playtime Theaters, Inc.* case, the Court specifically approved an ordinance which restricted location of adult motion picture theaters within 1,000 feet of any residential "zone." *Renton*, 475 U.S. 41. Marion County, Indiana, has chosen to secure the protection of its residentially zoned areas, as did the City of Renton. Despite Blue Flame's arguments to the contrary, such protection is constitutionally valid, and Blue Flame's Petition should be denied.

CONCLUSION

The decision rendered by the Court of Appeals of Indiana was wholly consistent with the precedent established by this Court. Marion County, Indiana, has not attempted to ban the type of adult activity which is promoted by Blue Flame. Instead, Marion County has placed reasonable regulation upon the time, place, and

manner of Blue Flame's adult entertainment activities. Such restrictions have been consistently approved by this Court in the past. For all of the reasons set forth herein, the Commission respectfully prays that Blue Flame's Petition be denied.

Respectfully submitted,

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